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IN THE

Supreme Court of the United States

October Term, 1964

No. 688

In the Matter of the Estate of LILLIAN ENG,
Deceased,

BALDO M. KRISTOVICH, Public Administrator,
Petitioner,

vs.

SHU TONG NG,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION THREE.

HAROLD W. KENNEDY,
County Counsel of Los Angeles County
and
GEORGE W. WAKEFIELD,
Chief Assistant County Counsel
and
S. ROBERT AMBROSE,
Deputy County Counsel
By HAROLD W. KENNEDY,
648 Hall of Administration
Los Angeles 12, California
Attorneys for Petitioner,
Public Administrator of the County
of Los Angeles.

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PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION THREE.

Petitioner, Public Administrator of the County of Los Angeles, prays that a writ of certiorari issue to review the judgement of the California District Court of Appeal, Second Appellate District, Division Three.

CITATIONS TO OPINION BELOW

The opinion of the California District Court of Appeal, (last document on file in Certified Record) reproduced in Appendix "A" to this petition was filed on June 24, 1964, and is reported in 228 Advanced California Appellate 181.

JURISDICTION

The judgement of the District Court of Appeal of the State of California, Second Appellate District, was entered on June 24, 1964. A timely petition for hearing in the Supreme Court of California was filed and was denied on August 20, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. § 1256(3) since the validity of a treaty of the United States is drawn in question.

QUESTIONS PRESENTED

Is the Treaty of Friendship, Commerce and Navigation of the United States of America and the Republic of China, which gives reciprocal rights of inheritance to real and personal property to all residents and citizens of each respective country inapplicable to those captive on the mainland because of official acts of the United States Department of State?

TREATY AND STATUTE INVOLVED

The treaty involved is the Treaty of Friendship, Commerce and Navigation between the United States of America and the Republic of China, which was signed on November 4, 1946, and entered into force November 30, 1948. (63 Stats. at large, pt. 2, p. 1300). The pertinent provisions of the treaty material to the question of reciprocal rights of inheritance are Sections 2 and 4 of Article VIII; see Appendix "B". The California Statutes involved are Section 259 of the Probate Code which governs California law as to reciprocal rights of inheritance with foreign countries and Section 422 of the Probate Code which governs priorority as to whom letters of administration shall issue.

Section 259 of the California Probate Code reads as follows:

> "The right of aliens not residing within the United States or its territories to take real property in this State by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take real property upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are residents and the right of aliens not residing in the United States or its territories to take personal property

in this State by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a receprocal right upon the part of citizens of the United States to take personal property upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are residents."

Section 422 of the California Probate Code reads as follows:

"Administration of the estate of a person dying intestate must be granted to one or more of the following persons, who are entitled to letters in the following order, the relatives of the decedent being entitled to priority only when they are entitled to succeed to the estate or some portion thereof:

(1) The surviving spouse, or some competent person whom he or she may request to have appointed.
(2) The children.
(3) The grandchildren.
(4) The parents.
(5) The brothers and sisters.
(6) The next of kin entitled to share in the estate.
(7) The relatives of a previously deceased spouse, when such relatives are entitled to succeed to some portion of the estate.

(8) The public administrator.
(9) The creditors.
(10) Any person legally competent."

STATEMENT OF THE CASE

This case involves the question of who has a prior right to letters of administration—the petitioner public administrator, or the respondent—bother of the decedent's predeceased spouse. The decision of this question in turn depends upon whether there was, at the date of the decedent's death on December 5, 1962, reciprocity of inheritance between residents and citizens of the Republic of China and residents and citizens of the United States, where the Chinese heirs—decedent's mother and the mother of her predeceased spouse — were living on the mainland of China at or near Canton, which had been overrun and occupied by the Chinese communists. If such reciprocity existed, as was found by the trial court, the above two persons are the sole statutory heirs entitled to succeed to the estate and the public administrator has prior rights to letters of administration over the respondent Ng, who would take no portion of the estate.

At the trial of the two opposing petitions, the Public Administrator referred the court to the treaty of 1946 between the United States and the Republic of China establishing reciprocal rights of inheritance as to real and personal property between citizens

and residents of the respective signatory nations (Certified Record, Page 38 of Reporter's Transcript.) The trial court took judicial notice of this treaty. The Public Administrator also introduced evidence in the form of a statement from the United States Department of State that the treaty of 1946 was in full force and effect between its respective signatories at the date of the decedent's death and thereafter. (Certified Record, Page 38 of Reporter's Transcript.) The trial court further took notice of the fact that the Communist regime is not recognized by the United States goverment and our government does recognize a continuing state of civil war between said Communist regime and the Republic of China. (Certified Record, Reporter's Transcript, p. 45.) The Respondent introduced no evidence to refute or contradict that of the Public Administrator, but did give evidence that both his mother and the decedent's mother were citizens of the Republic of China in 1922 and thereafter. (Certified Record, Reporter's Transcript, pp 18, 22.) Respondent gave no evidence that either of them had ever renounced their Republic of China citizenship or allegiance or were other in status than citizens or nationals of the Republic of China in territory that had been overrun and occupied by the Communist regime.

Upon the above record the trial court found that both the decedent's mother and the mother of her predeceased spouse were citizens and residents of

the Republic of China; that the treaty between the Republic of China and the United States of America granted reciprocal rights of inheritance and succession as to personal and real property located in the respective countries and that on the date of the decedent's death, December 5, 1962, there existed reciprocal rights of inheritance between citizens of the Republic of China and citizens of the United States of America. (Cerified Record, Reporter's Transcript, pp. 44-45.)

It is submitted that the California District Court of Appeal has erroneously decided the point of law as to whether or not under the circumstances of this case the foreign heirs are afforded the benefit of rights of inheritance secured to citizens and residents of the Republic of China by existing treaty between the Republic of China and the United States of America and further that its decision is in conflict with decisions of this Court in *Clark v. Allen,* 331 U.S. 503, 67 S. Ct. 431, 91 L. Ed. 1633, and *Kolovrat v. Oregon,* 366 U.S. 187, 6 L. Ed. 2d 218.

Further, said District Court of Appeal opinion is also in direct conflict with the *Estate of Nepogodin,* 134 Cal. App. 2d 161, a prior California District Court of Appeal opinion involving the same treaty and the same nations, which held the treaty is applicable to establish reciprocal rights of inheritance despite the communist control.

A. Presentation of Federal Question in the State Court.

Superior Court of the State of California. In the trial court it was submitted by the Public Administrator that there were reciprocal rights of inheritance with the Republic of China because of the Treaty of Friendship, Commerce and Navigation between the United States and the Republic of China. (Certified Records, Reporter's Transcript, p. 36.) The Public Administrator also introduced a letter from the United States Department of State dated January 15, 1963, stating the aforesaid treaty is still in full force and effect. (Certified Record, Reporter's Transcript, p. 38.) The trial court judge took judicial notice of the treaty and, therefore, found reciprocal rights of inheritance between the United States and the Republic of China and on that basis ordered letters of administration to issue to the Public Administrator.

District Court of Appeal. Respondent Ng appealed the trial court decision to the District Court of Appeal questioning whether the Treaty of Friendship, Commerce and Navigation was applicable to the mainland of China to establish reciprocal rights of inheritance. (Certified Record, Appellant's Brief on Appeal, p. 5.)

The Public Administrator in his reply brief to the District Court of Appeal said the treaty was applicable as the supreme law of the land under Article VI, Clause 2 of the United States Constitution. (Certified Record, Respondent's Brief, pp. 5-8.)

The District Court of Appeal in its opinion took judicial notice of certain official public acts of the United States Department of State and determined from these acts the treaty to be inapplicable. (Certified Record, Opinion of District Court of Appeal, p. 6.) The official acts of the United States Department of State judicially noticed were as follows:

1. Occasional dealings by our government with representatives of the People's Republic. (Certified Record, Opinion of District Court of Appeal, pp. 6-7.)

2. Refusal of United States to issue passports for travel in communist held territory. (Certified Record, Opinion of District Court of Appeal, pp. 8-9.)

3. Policy of United States forbidding trading with communist China under the Foreign Assets Control Regulation. (Certified Record, Opinion of District Court of Appeal, p. 9.)

Supreme Court of California. The Public Administrator petitioned the California Supreme Court for a hearing contending that the 1946 treaty between the United States and the Republic of China was applicable to establish reciprocal rights of inheritance to citizens and residents of mainland China despite the official public acts judicially noticed by the District Court of Appeal. (Certfied Record, Petition for hearing in the Supreme Court, pp. 2-7.) The California Supreme Court denied the Public Administrator's petition on August 20, 1964. (Certified Record, Order Denying Hearing.)

REASONS FOR GRANTING THE WRIT

In 1946, this nation entered into the Treaty of Friendship, Commerce and Navigation with the Republic of China. Among the numerous matters comprehended in that treaty was the official recognition by the two respective governments of the reciprocal rights of the citizens of each government to inherit in accord with law from the estates of the citizens of the other. This treaty and this provision was the will of the executive branch of the federal government and it remains alive to this day. Our government recognizes to this day the Republic of China as the legal government not only of the Island of Formosa, but of the mainland of China. Our government necessarily, whatever may be the political ability of the Republic of China to enforce and advance the rights of Chinese living on the mainland, views these Chinese as citizens of the Republic of China and unless and until by proper action of the executive sphere the Treaty of Friendship, Commerce and Navigation is disavowed in whole or in particular, the treaty must be applied by our courts.

The decision of the California District Court of Appeal impinged on the proper function of the executive. By judicial fiat it purports to write governmental decisions out of existence and write in a local judicial tribunal's views of political matters. This we submit is the far reaching import of that

court's assertion that it will not uphold the rights stemming from the Treaty of Friendship, Commerce and Navigation between the United States and the Republic of China.

I.

TREATY IS THE SUPREME LAW OF THE LAND AND SUPERSEDES CONFLICTING PROVISIONS OF STATE LAW.

It is, of course, fundamental that treaties of the United States are the supreme law of the land. Article VI, Clause 2, of the United States Constitution.

The treaty in the case at bar under the provisions of Section 2 and 4 of Article VIII (63 Stats. at large, pt. 2, p. 1300) gives to the national of either nation inheritance rights to real and personal property left to them within the other nation's territory regardless of the nationality of the decent. The Treaty of Friendship, Commerce and Navigation between the United States and the Republic of China is still in full force and effect. "United States Treaties In Force," 1963 publication of United States State Department. This treaty supersedes California's Probate Code Section 259. This court said in *Clark v. Allen,* 331 U.S. 503, 67 S. Ct. 1431, 91 L. Ed. 1633 at Page 1645 of 91 L. Ed. that,

> "Rights of succession of property are determined by local law. (Citations.) Those rights may be affected by an overriding federal policy, as where

a treaty gives different or conflicting arrangements. (Citations.) Then the state policy must give way."

II.

ABROGATION OF A TREATY IS A POLITICAL QUESTION.

The California District Court of Appeal in holding the Treaty of Friendship, Commerce and Navigation between the United States of America and the Republic of China inapplicable as to reciprocal rights of inheritance between the respective signatory nations, has decided a question which has traditionally been held by this court to be a political question which is to be determined by our national government. *Clark v. Allen,* 331 U.S. 503, 67 S. Ct. 431, 91 L. Ed. 1633.

Our national government has not decreed that this treaty is terminated or inapplicable or that it does not apply to all territory — continental and insular of the Republic of China. To the contrary, the official position of our national government is that the treaty is in full force and effect. "United States Treaties In Force," United States Departmentment of State publication for the year 1963.

The California District Court of Appeal in deciding the *Estate of Nepogodin,* 134 Cal. App. 2d 161, which involved the same treaty as in the case at bar, said at Page 170,

"As to the ability of a foreign state to perform its treaty obligations and as to the question whether a treaty has been terminated the action of the political departments of our government is controlling. (*Clark v. Allen,* 331 U.S. 503, 514 [67 S. Ct. 1431, 91 L. Ed. 1633, 170 A.L.R., 953]; *Terlinden v. Ames,* 184 U.S. 270 285, 288 [22 S. Ct. 484, 46 L. Ed. 534].) In *Clark v. Allen* it was held that the fact that Germany after its defeat in the Second World War was under Allied occupation could not be considered by the court to have terminated a treaty between that country and the United States concerning the right to succession to real property when there was no evidence that the political departments had so considered it. The same must apply *a fortiori* to the civil war in China . . ."

III.

CALIFORNIA DISTRICT COURT OF APPEAL DECISION IS IN CONFLICT WITH UNITED STATES SUPREME COURT DECISIONS.

This court held in the case of *Clark v. Allen,* 311 U.S. 503, 67 S. Ct. 1431, 91 L. Ed 1633, which involved reciprocal rights of inheritance between Germany and the United States, that the fact that Germany after its defeat in the Second World War was under allied occupation could not be considered by the court to have terminated a treaty between that country and the United States where there was no evidence that the political departments of the United States had so considered it.

Further, this court in *Clark v. Allen, supra,* held that the Trading with the Enemy Act adopted by Congress during World War II, would not effect the inheritance rights granted resident aliens under the treaty existing at that time with Germany. This court continued to recognize in the *Allen Case, supra,* that the outbreak of war between contracting parties to a treaty does not necessarily make inapplicable or abrogate said treaty.

Also in a more recent case involving communist Yugoslavia, this court held in *Kolovrat v. Oregon,* 336 U.S. 187, 6 L. Ed. 2d 218, that the fact that the Yugoslavia government controlled the exchange of money between Yugoslavia and the United States

would not in any way abrogate or make the treaty inapplicable between the United States and Yugoslavia.

The very actions which this court has held do not abrogate or suspend a treaty have been construed by the California District Court of Appeal to make a treaty inapplicable despite its statement that, "The United States does not extend diplomatic recognition to the People's Republic but continues to regard the Republic of China, presently residing on the Island of Formosa, as the government of China." (Certified Records, Opinion of California District Court of Appeal, pp. 6-7.)

CONCLUSION

This petition should be granted because the California District Court of Appeal opinion has held a federal treaty inapplicable, which is inconsistent with the decisions of this court and in conflict with the Supremacy Clause of the United States Constitution. If this decision is allowed to stand, the privileges of millions of Americans and foreign aliens established under treaties are in jeopardy by lower courts establishing what they think our national policy is, or should be.

HAROLD W. KENNEDY,
County Counsel of Los Angeles County

and

GEORGE W. WAKEFIED,
Chief Assistant County Counsel

and

S. ROBERT AMBROSE,
Deputy County Counsel

By HAROLD W. KENNEDY,
Attorneys for Petitioner,
Public Admisintrator of the County
of Los Angeles.

APPENDIX "A"

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

Estate of LILLIAN ENG, Deceased.	)	
SHU TONG NG,	)	
Petitioner, Objector and Appellant,	)	Civil No. 27566
vs	)	
BALDO M. KRISTOVICH, Public Administrator Petitioner, Objector and Respondent.	)	

[Filed June 24, 1964 Dist. Court of Appeal, Second Dis.; J. T. Alley, Clerk].

Appeal from an order of the Superior Court of Los Angeles County appointing an administrator. Clarke E. Stephens, Judge. Reversed.

Eng and Lum and Albert C. Lum for Petitioner, Objector and Appellant.

Harold W. Kennedy, County Counsel, and S. Robert Ambrose, Deputy County Counsel, for Petitioner, Objector and Respondent.

This appeal from an order appointing an administrator turns upon the right of a Chinese national, residing in Canton, China, to inherit from a California decedent.

The decedent, a resident of Los Angeles County, California, but whose nationality is unspecified in the record, died intestate December 5, 1962, leaving both real and personal property. She was a widow and childless. Some of her estate had been the community property of the decedent and her predeceased spouse. She was survived by her mother and her mother-in-law, who would share in the community property under Probate Code, section 228.

The brother of decedent's deceased husband filed a petition for letters of administration, alleging that he was an heir at law. The public administrator also petitioned for letters. The two petitions were heard together and evidence was taken, after which the probate court found that the mother and the mother-in-law of the decedent were the heirs at law, and both were citizens and residents of the Republic of China. The court concluded that the brother-in-law was not entitled to share in the estate, and that the public administrator therefore had priorority under Probate Code, section 422, and was entitled to letters of administration.

The brother-in-law has appealed from the order denying his petition and granting the petition of the public administrator.

Appellant contends that under Probate Code, section 259,[1] these aliens are not entitled to inherit in California unless the country in which they reside extends reciprocal rights to United States citizens, and that the record contains no evidence to show that the communist government which now controls the Chinese mainland extends any such rights to the United States citizens.

In reaching its decision the probate court took judicial notice of a Tready of Friendship, Commerce and Navigation between the United States of America and the Republic of China, which was signed November 4, 1946, and entered into force November 30, 1948. (63 Stats. 1300.)

Under the provisions of sections 2 and 4 of article VIII of this treaty, each country agrees in substance

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[1]Probate Code, section 259: "The right of aliens not residing within the United States or its territories to take real property in this State by succession or testimentary disposition, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take real property upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are residents and the right of aliens not residing in the United States or its territories to take personal property in this State by succession or testamentry disposition, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take personal property upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are residens."

that the nationals of either party will be permitted to inherit both real and personal property left to them within the other party's territory, regardless of the nationality of the decedent.[2]

Article XXVII of this treaty reads as follows:

> "Subject to any limitation or exception provided in this Treaty or hereafter agreed upon between the Governments of the High Contracting Parties, the territories of the High Contracting Parties to which the provisions of this Treaty extend shall be understood to comprise all areas of land and water under the soverèignty or authority of either High Contracting Party, except the Panama Canal Zone."

By its terms this treaty continues in force for a period of five years, and thereafter until terminated on one year's notice by either party. No notice of termination has ever been given.

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[2]Section 2, article VIII: "If a national, corporation or association of either High Contracting Party, whether or not resident and whether or not engaged in business or other activities within the territories of the other High Contracting Party, is on account of alienage prevented by the applicable laws and regulations within such territories from succeeding as devisee, or as heir in the case of a national, to real or other immovable property situated therein, or to interests in such property, then such national, corporation or association shall be allowed a term of three years in which to sell such property or interest, this term to be reasonably prolonged if circumstances render it necessary. The transmission or receipt of such property shall be exempt from the payment any estate, succession, probate or administrative taxes or charges other or higher than those now or hereafter imposed in like cases upon the nationals corporations or associations of the High Contracting Party in whose territory the property is or the interests therein are situated. Moreover, such devisee or heir shall, in conformity with such applicable laws and regulations as are not inconsistent with paragraph 3 of Aricle XIX, be permitted without interference to withdraw the proceeds of the sale of such property by obtaining foreign exchange, in the currency of the High Contracting Party of which

This treaty, if applicable to the present situation, will prevail over any conflicting provisions of state law. (*Kolovrat v. Oregon,* 366 U.S. 187; 6 L.Ed 2d 218.) If the treaty is not applicable, then California may apply its local laws of succession, of which Probate Code, section 259, is a part. (*Clark v. Allen,* 331 U.S. 503, 91 L.Ed. 1633.)

In seeking to determine whether subsequent events have deprived the Chinese people of the benefits of the 1946 treaty, it is necessary to look to the acts of

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the devisee is a national, corporation or association, or of which the heir is a national, during a period not in excess of three years after application therefore, upon the most favorable terms applicable to such currency at the time application for the withdrawal of such proceeds is filed, provided such application is made within one year after receipt of the proceeds of sale to which it relates."

Section 4, article VIII: "The nationals of either High Contracting Party shall have full power to dispose of personal property of every kind anywhere within the territories of the other High Contracting Party, by testament, donation or otherwise and their heirs, legatees or donees, being persons of whatever nationality or corporations or associations wherever created or organized, whether resident or non-resident and whether or not engaged in business within the territories of the High Contracting Party where such property is situated, shall succeed to such property, and shall be permitted to take possession thereof, either by themselves or by others acting for them, and to retain or dispose of it at their pleasure, exempt from any restrictions, taxes or charges other or higher than to which the heirs, legatees or donees of nationals of such other High Contracting Party are or may hereafter be subject in like cases. The nationals, corporations and associations of either High Contracting Party shall be permitted to succeed, as heirs, legatees and donees, to personal property of every kind within the territories of the other High Contracting Party, left or given to them by nationals of such other High Contracting Party or by nationals of any third country, and shall be permitted to take possession thereof, either by themselves or by others acting for them, and to retain or dispose of it at their pleasure, exempt from any restrictions, taxes or charges other or higher than those to which the nationals, corporations and associations of such other High Contracting Pary are or may hereafter be subject in like cases. . . ."

The language of section 2 is very similar to the provisions of the German treaty construed in *Clark v. Allen,* 331 U.S. 503, where the court said (at p. 508): "The rights secured are in terms a right to sell within a specified time plus a right to withdraw the proceeds and an exemption from discriminatory taxation. It is plain that those rights extend to the German heirs of 'any person' holding realty in the United States. And though they are not expressed in terms of ownership or the right to inherit, that is their import and meaning."

the legislative and executive branches of the federal government for an indication of national policy. (*Clark v. Allen, supra.*)

By taking judicial notice of some of the official acts of the United States Department of State (as authorized by Code of Civil Procedure, section 1875, subdivision 3) this court is aware that the mainland of China is, and for several years has been, under the control of a political organization commonly referred to in the United States as "Communist China" or "Red China," but which calls itself "The People's Republic of China." The United States does not extend diplomatic recognition to the People's Republic, but continues to regard the Republic of China, presently residing on the island of Formosa, as the government of China. (See, for example, 44 Dep't State Bull. 439, 441 1961) quoting a public statement made by Secretary of State Rusk.) Notwithstanding its refusal to extend recognition of Communist China, our government has, on occasion, delt with representatives of that regime. In 1955 representatives of the United States and representatives of Communist China confered and entered into a written agreement concerning the return of civilians to their respective countries. (U.S. Dep't of State, American Foreign Policy: Current Documents, 1956, at 791 (1959).)

The declaration of the official spokesmen for American foreign policy have made it clear that the

policy of nonrecognition is not based upon any doubts that the communist regime is in power, but is the result of the acts and attitudes of that regime.[3]

The official public acts of the federal government demonstrate that our government does not regard the 1946 treaty as controlling the relationships between American citizens and the inhabitants of Communist China at the present time. Article II of the 1946 treaty states: "The nationals of either High Contracting Party shall be permitted to enter the territories of the other High Contracting Party, and shall be permitted to reside, travel and carry on trade throughout the whole extent of such territories." Today, contrary to what the treaty would require if it were operative, the United States refuses to issue passports to any of its citizens for travel in the com-

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[3]See, for example, the statement of Secretary of State Dulles in his report on the Berlin Foreign Ministers Meeting (January 25 - February 18, 1954): "My basic position with reference to Communist China was made clear beyond the possibility of misunderstanding.

"In my opening statement (January 26), I said, 'I should like to state here, plainly and unequivocally, what the Soviet Foreign Minister already knows—the United States will not agree to join in a five-power conference with the Chinese Communist aggressors for the purpose of dealing generally with the peace of the world. The United States refuses not because, as is suggested, it denies that the regime exists or that it has power. We in the United States well know that it exists and has power because its aggressive armies joined with the North Korean agressors to kill and wound 150,000 Americans . . . We do not refuse to deal with it where occasion requires . . . It is, however, one thing to recognize evil as a fact. It is another thing to take evil to one's breast and call it good.'

"That explains our non-recognition of the Communist regime and also our opposition to its admission to the United Nations." (30 Dep't State Bull. 343, 346 (1954) reprinted in U.S. Dep't of State, American Foreign Policy 1950-1955, at 85, 88 (1957).)

For example of additional statements, see Address of the American Ambassador to Canada, June 21, 1956; 35 Dep't State Bull. 56 (1956) reprinted in U.S. Dep't of State, American Foreign Policy: Current Documents, 1956, at 752 (1959); and statement of Secretary of State Rusk, 48 Dep't State Bull. 698, 702 (1963).

munist-held territory. (Dep't State Bull. 313 (1956) reprinted in U.S. Dep't of State, American Foreign Policy: Current Documents, 1956, at 805 (1959).) In *Worthy v. Herter,* 270 F. 2d 905 (D.C. Cir. 1959) the court held that the refusal of the Secretary of State to issue a passport for travel in Communist China was a proper exercise of the executive power to conduct foreign relations. Judicial relief was denied to an applicant who sought to compel the issuance of such a passport.

The present United States policy against trading with Communist China is just as clear. Foreign Assets Control Regulations of the Department of the Treasury, effective December 17, 1950, issued under the Trading with the Enemy Act (50 U.S.C. App. § 5), have forbidden all persons under the jurisdiction of the United States to engage in transactions with any Chinese national, or even to deal in merchandise originating in China except Formosa, unless specifically authorized by the Secretary of the Treasury. (31 C.F.R. §§ 500.101-500.808.)

In *United States v. China Daily News,* 224 F. 2d 670 (2 Cir. 1955), the court affirmed the conviction of several persons under the criminal sections of the Trading with the Enemy Act, their crimes being that they had extended credit and received payments from a Chinese bank and had set checks to persons on the China mainland.

These indications of the national policy toward Communist China and the inhabitants of the mainland provide satisfactory precedent for the decision here. Since the executive branch of the federal government does not recognize the treaty as entitling the inhabitants of Communist China to receive visits from or trade with American citizens, the courts of California are justified in concluding that under present conditions the treaty is not applicable to confere inheritance rights on such persons.

It is immaterial that the Foreign Assets Control Regulations exclude from their prohibition "Any transfer to any person by intestate succession." (31 C.F.R. § 500.525.) This provision, of course, does not confer any rights of succession on any person who is not entitled to succeed under a treaty or under local laws of succession. The Foreign Assets Control Regulations are relevant to this discussion only for the purpose of demonstrating that the federal government conducts its affairs upon the premise that mainland China is not now under the control of the recognized government of the Republic of China and that the persons on the mainland are not entitled to the benefits of the 1946 treaty.

The findings of fact made by the trial court refer to the mother and mother-in-law of the decedent as citizens of the Republic of China. This finding is based upon evidence that those persons are Chinese and reside in Canton. Ther is no other evidence of their political affiliation. There appears to be no reason to treat

these persons any differently from any other person of Chinese nationality who resides in the territory held by the communist and is subject to the control of that regime.

It thus becomes necessary to consider the effect of California's reciprocity law as set forth in the Probate Code. The burden is upon the public administrator to prove the existence of the reciprocal rights referred to in section 259. *Estate of Bevilacqua*, 31 Cal. 2d 580, 584.)

In the Probate Court the public administrator relied entirely upon the 1946 treaty, but since we know that the recognized government of the Republic of China, which made the treaty, now has nothing to do with the devolution of property in Canton, the treaty is not evidence that reciprocity in fact exists. There being no other evidence on the subject, the order must be reversed.

Appellant's brienf suggests that this court take judicial notice of the absence of any right of United States citizens to inherit in Communist China, and direct the probate court to deny the public administrator's petition. The 1957 amendment to Code of Civil Procedure, section 1875, now allows this court to take judicial notice of foreign law. Nevertheless, we have concluded it would be inadvisable to attempt to resolve the issue by judicial notice in an appellate court for two reasons.

The first is that taking judicial notice of foreign law may be quite a different process from taking judicial notice of other matters which can be satisfactorily resolved by examination of readily accessible documents of unquestioned authority. The relevant parts of Code of Civil Procedure, section 1875, are as follows:

> "Courts take judicial notice of the following:
>
> . . .
>
> "4. The law and statutes of foreign countries and of political subdivisions of foreign countries; provided, however, that to enable a party to ask that judicial notice thereof be taken, reasonable notice shall be given to the other parties to the action in the pleadings or otherwise; . . .
>
> "In all these cases the court may resort for its aid to appropriate books or documents of reference. In cases arising under subdivision 4 of this section, the court may also resort to the advice of persons learned in the subject matter, which advice, if not received in open court, shall be in writing and made a part of the record in the action or proceeding."

The practical value of these provisions for giving notice and for consulting learned persons is particularly apparent when one considers the difficulties of investigating the legal system of Communst China. (*Cf, Estate of Gogabashvele,* 195 Cal. App. 2d 503, 529, discussing the legal system of the Soviet Union.)

We observe that appellant's brief fails to cite any book or document of reference containing the law which he desires this court to notice. The trial court is the place where the inquiry should first be conducted. (*Cf. Estate of Feierman*, 202 Cal. App. 2d 552.)

The second reason is that the existence of reciprocity may involve more than formal law. The issue may turn upon the practical working of the foreign system, as to which oral testimony may be required. (*Estate of Schluttig*, 36 Cal. 2d 416, 423; *cf. Estate of Arbulich*, 41 Cal. 2d 86, 91; *Estate of Gogabashvele, supra*, at 508.)

There is no conflict between what is decided here and what was said in *Estate of Nepogodin*, 134 Cal. App. 2d 161. That case involved a California estate of a decedent who died January 13, 1949, and a group of claimants who resided in Harbin, Manchuria, China, then under the dominion of the communist government of China. Unlike the present case, there was no evidence or contention in *Nepogodin* that the claimants were nationals of China, only that they were residents. The treaty therefore conferred no rights upon these clamants, and was pertinent only as evidence that China granted inheritance rights to United States citizens, as required by Probate Code, section 259. The *Nepogodin* opinion discussed the conditions which existed in China in 1949. The communist had taken control of much of the territory, including Manchuria. The war was still going on, and the nationalist govern-

ment had not yet been driven off the continent. The People's Republic was not proclaimed until September 21, 1949. The court observed (p. 170): 'It is wholly unacceptable proposition, not supported by any authority, that with every change in the fortunes of a fluid civil war, the territory of the state and the sphere of applicability of its treaties should change." Upon that record the trial court's finding that the 1946 treaty was still in effect, and that by reason of the treaty reciprocity existed, was affirmed.

The present case, arising 13 years later, involves no "fluid civil war." The United States denies the legality and morality of the communist regime, but takes cognizance of its existence and power. The relationships of the United States and its citizens with the people of the Chinese mainland are now affected by this reality.

The order is reversed.

FILES, J.

We concur.

SHINN, P. J.

FORD, J.

APPENDIX "B"

TREATY OF FRIENDSHIP, COMMERCE AND NAVIGATION BETWEEN UNITED STATES OF AMERICA AND THE REPUBLIC OF CHINA (63 Stats. at large, pt. 2, p. 1300)

Section 2, article VIII:

"If a national, corporation or association of either High Contracting Party, whether or not resident and whether or not engaged in business or other activities within the territories of the other High Contracting Party, is on account of alienage prevented by the applicable laws and regulations within such territories from succeeding as devisee, or as heir in the case of a national, to real or other immovable property situated therein, or to interests in such property, then such national, corporation or association shall be allowed a term of three years in which to sell such property or interest, this term to be reasonably prolonged if circumstances render it necessary. The transmission or receipt of such property shall be exempt from the payment of any estate, succession, probate or administrative taxes or charges other or higher than those now or hereafter imposed in like cases upon the nationals, corporations or associations of the High Contracting Party in

whose territory the property is or the interests therein are situated. Morever, such devisee or heir shall, in conformity with such applicable laws and regulations as are not inconsistent with paragraph 3 of Article XIX, be permitted without interference to withdraw the proceeds of the sale of such property, by obtaining foreign exchange, in the currency of the High Contracting Party of which the devisee is a national, corporation or association, or of which the heir is a national, during a period not in excess of three years after application therefor, upon the most favorable terms applicable to such currency at the time application for the withdrawal of such proceeds is filed, provided such application is made within one year after receipt of the proceeds of sale to which it relates."

Section 4, article VIII:

"The nationals of either High Contracting Party shall have full power to dispose of personal property of every kind anywhere within the territories of the other High Contracting Party, by testament, donation or otherwise and their heirs, legatees or donees, being persons of whatever nationality or corporations or associations whereever created or organized, whether resident or non-resident and whether or not engaged in business within the territories of the High Contracting Party where such property is situated shall succeed to such property, and shall be per-

mitted to take possession thereof, either by themselves or by others acting for them, and to retain or dispose of it at their pleasure, exempt from any restrictions, taxes or charges other or higher than those to which the heirs, legatees or donees of nationals of such other High Contracting Party are or may hereafter be subject in like cases. The Nationals, corporations and associations of either High Contracting Party shall be permitted to succeed, as heirs, legatees and donees, to personal property of every kind within the territories of the other High Contracting Party, left or given to them by nationals of such other High Contracting Party or by nationals of any third country, and shall be permitted to take possession thereof, either by themselves or by others acting for them, and to retain or dispose of it at their pleasure, exempt from any restrictions, taxes or charges other or higher than those to which the nationals, corporations and associations of such other High Contracting Party are or may hereafter be subject in like cases . . ."

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IN THE

Supreme Court of the United States

October Term 1964

No. 688

In the Matter of the Estate of

LILLIAN ENG,

Deceased.

BALDO M. KRISTOVICH, Public Administrator,

Petitioner,

vs.

SHU TONG NG,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI.

Opinion Below.

This petition seeks to review the opinion of the District Court of Appeal, Second Appellate District, Division Three, reported in 228 Advance California Appellate 181 and 39 California Reporter 254 filed June 24, 1964; in which it was held that pursuant to Section 259 of the California Probate Code, persons residing at or near Canton, on the Chinese mainland, were not entitled to take by intestate succession property located in California and belonging to deceased residents of California.

Jurisdiction.

Jurisdiction is asserted by petition under 28 U.S.C. §1257(3).

Questions Presented.

Whether, under conditions existing today, and at the time decedent, whose estate is involved herein, died, to wit, December 5, 1962, the Treaty of Friendship, Commerce and Navigation between the United States and the Republic of China, in force on November 30, 1948 (63 Stats, at Large, 1299), compels the State of California to permit a person residing in "Communist" China, to take by intestate succession or devise from a California resident?

Statement of the Case.

Decedent, Lillian Eng, died on December 5, 1962. Except for the peculiar facts of this case, it would not be disputed that the persons entitled to take from her estate are her mother and the mother of her predeceased spouse (California Probate Code §228). However, both mothers reside on the Chinese mainland.

Respondent contends that California Probate Code §259 is valid legislation as applied to this case, and that the section prohibits these persons from taking. If respondent is correct decedent's property should pass one-half to respondent (who is the brother of the predeceased spouse) and one-half to decedent's other relatives.

No contention is made by respondent that the treaty relied on by the petitioner, if inconsistent with state law, would not control. It is also admitted that the treaty has not been formally abrogated as to territory and nationals

of the Republic of China. If the mothers resided on Taiwan (Formosa) they would certainly be entitled to take — even if California statutes were to the contrary. However, respondent submits that properly interpreted, the treaty is not inconsistent with Section 259 and does not mean that persons on the Chinese mainland are entitled to the rights guaranteed therein.

This contention is based:

(1) That, at least since July 28, 1951, the Republic of China does not exercise sovereignty over the mainland. On that date, by a note delivered to the Secretary of State, the Ambassador of the Republic of China acknowledged that the mainland was dominated by the Communists. (Treaties in Force on January 1, 1964, page 41.)

(2) That under international law, a person residing on the mainland is not a "national" of the Republic of China.

Article VIII of the aforesaid treaty guarantees succession rights to "nationals". It reads as to "real property":

> "The nationals, corporations and associations of either High Contracting Party shall be permitted to acquire, hold and dispose of real or other immovable property throughout the territories of the other High Contracting Party . . ., the treatment accorded to such nationals, corporations and associations shall not be less favorable than that accorded to nationals, corporations and associations of any third country." (Article VIII, Section 1, page 1306.)

As to "personal property" it reads:

> "The nationals, corporations and associations of either High Contracting Party shall be permitted to succeed, as heirs, legatees and donees to personal property of every kind within the territories of the other High Contracting Party, . . . and shall be permitted to take possession thereof, either by themselves or by others acting for them . . ." (Article VIII, Section 4, page 1308.)

ARGUMENT.

Contrary to the view of the petitioner, and of his attorneys, the Chinese Peoples Republic is an established and existing government. This fact may be unpleasant, but it is nevertheless a fact. Merely placing one's head in the sand and pretending that the Republic of China governs the mainland will not make the Communists disappear from that portion of the earth.

Petitioner as the Public Administrator of the County of Los Angeles, and his attorneys, have placed their heads in the sand. By so doing they fail to realize that they will actually aid the governmental entity which they "wish" did not exist. For if the appellant is correct United States dollars and other assets may easily be transferred to the Chinese Communists. There are many United States citizens of Chinese ancestry who still have close relatives residing on the Chinese mainland. These relations, should they be expressly named in a will, or should they be heirs at law of an intestate, could claim the estate funds by merely retaining counsel in one of the many nations maintaining diplomatic relations with both the Chinese People Republic and the United States, who should prosecute their claims. Though this

may not occur with assets of the Ng estate, it is not outside the realm of possibility. And it is very probable that this would occur when these circumstances arise again should the petitioner's view correct.

Neither the Government of the United States nor the Government of the Republic of China pretends that the Chinese Communist regime does not exist. This is evidenced by the aforesaid note of July 28, 1951. It is also evidenced by the Mutual Defense treaty between the Republic of China and the United States, in force on March 3, 1955 (6 UST 433). Article VI of that treaty defines the territory of the Republic of China to be "Taiwan and the Pescadores" (page 437). See also 31 CFR Sections 500.201 and 500.328 scheduling China as a "designated foreign country, but exempting areas under the control of the "recognized" government. Our non-recognition of the Communist Chinese is not a matter of doubting their existence but rather is a matter of foreign policy. Contrary to petitioner's statements on page 12 of his petition, our national government has unequivocably recognized that the Republic of China is not sovereign on the mainland.

In short, all governments, including ours, recognize as a fact that there is a well established, perhaps permanent, Communist government on the Chinese mainland. The Public Administrator cannot, whatever arguments he puts forth, change this fact.

What then is the legal status of persons residing on the mainland? Are they "nationals" of the Peoples Republic or of the Taiwan Government? If they are not nationals of the Republic of China (Taiwan Government) they are not protected by the treaty of Friendship, Commerce and Navigation.

"The term 'national' means a person owing permanent allegiance to a state." 8 U.S.C.A. §1101 (21).

In 56 Yale Law Review 58, 76 (1946) in an article by Maximillian Koessler, it is said:

> "The 'nationals' of a state are those who are under its personal sovereignty, that is, attached to it irrespective of the fact of their presence at a given moment."

Can it be said that domiciliaries of the Chinese mainland owe "permanent allegiance to" or are "attached to" the Chinese Government on Taiwan?

Respondents admit that merely because a nation's territory has been overrun by an enemy does not cause the residents of that territory to be "nationals" of the enemy nation. "Such a conquest, although the conqueror may intend to keep the conquered territory and therefore to annex it, does not confer a title so long as the war has not terminated *either through simple cessation of hostilities* or by a treaty of peace. . . . For annexation of conquered enemy territory, whether of the whole or of a part, confers a title only after a firmly established conquest and so long as war continues conquest is not firmly established." (emphasis added) (Oppenheim, International Law, a Treatise, 8th Ed., edited by H. Lauterpacht, Vol. 1, page 570.)

It is submitted that since the Communists have been in control of the mainland for fifteen years — and since active hostilities have ceased, the mainland has been "annexed" to the Communist Government. This had not yet occurred in 1949 when the situation facts considered in *Estate of Nepogodin*, 134 Cal. App. 2d 161, 285 P. 2d 672 (1955) occurred.

Oppenheim discusses the status of the persons residing in such conquered territory at page 571. It is there said:

> "As regards the national status of the subjects of the subjugated state, doctrine and practice agree that such enemy subjects as are domiciled on the annexed territory and remain there after annexation becomes *ipso facto* by the subjugation subjects of the subjugating state"

At page 656, it is explained that these persons acquire "the nationality of the state which acquires the territory." This is so under the International Law, even though the local law of the conquered state considers such persons to remain "nationals" or "citizens" of their former nation (see pp. 659-660 of Oppenheim).

This is the rule applied by the courts of the United States. *United States v. Percheman,* 7 Peters 51, 32 U.S. 32 (1833) discussed the status of property and persons residing in Florida after it was ceded by Spain to the United States. It was said that "(t)he people change their allegiance, their relation to their ancient sovereign is dissolved . . ." (page 87).

The cases relied on by petitioner are not in conflict with the above analysis. *Clark v. Allen,* 331 U.S. 503 (1947) involved whether or not a 1932 treaty between the United States and Germany was terminated by the state of war existing in 1942 between the two nations. This court held that the war did not cause the treaty to be terminated without official action to that effect by our government. Even though Germany, in 1947 and since 1945, was occupied by the Allied powers, there was no annexation, official or *de facto,* of German territory by any of these powers.

Kolovrat v. Oregon, 366 U.S. 187 (1960) involved the State of Oregon's attempt to declare its laws supreme to an 1881 treaty between the United States and Serbia, which treaty, as late as 1948 was considered as being in force by both the United States and Yugoslavia. In contrast, neither the United States nor the Peoples Republic of China considers the treaty relied on by petitioner as in effect between them.

And finally, *Estate of Nepogodin,* 134 Cal. App. 2d 161 (1955) involved a situation where an active civil war was existing.

It is respectfully submitted that logic and reason compel the conclusion that a person residing for nearly fifteen years in Communist China is no longer a "national" of the Republic of China because for fifteen years active hostilities have been terminated. This is also the conclusion which is reached by the principles of International Law. The judgment of the court below is correct.

Because the doctrines involved in reaching conclusion are so firmly established it appears unnecessary that this Honorable Court reiterate them.

Therefore the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

ALBERT C. LUM,
By Hiram W. Kwan,
Attorney for Respondent.

Of Counsel:
EDWARD J. ENG,
ALBERT C. LUM,

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 688

IN THE MATTER OF THE ESTATE OF LILLIAN ENG, DECEASED

BALDO M. KRISTOVICH, PUBLIC ADMINISTRATOR, PETITIONER

v.

SHU TONG NG

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEALS OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION THREE

MEMORANDUM FOR THE UNITED STATES

By order of the Court dated January 25, 1965, the Solicitor General was invited to express the views of the United States with respect to this case. For the reasons stated below, we believe that the matter is not one which calls for this Court's review.

Lillian Eng, a resident of Los Angeles County, California, died intestate on December 5, 1962. She left real and personal property in California, some of which was community property she had held with her husband who pre-deceased her (Pet. App. A, p. 2). Her survivors were her mother and mother-in-law, citizens of the Republic of China but now residing on the mainland of China, and a brother-in-law, the respondent.

Both the brother-in-law and petitioner, the public administrator for Los Angeles County, applied for letters of administration, invoking Section 422 of the California Probate Code.[1] The probate court awarded the letters to the public administrator, concluding that he had a prior right to them because the mother and mother-in-law were the decedent's heirs-at-law and the brother-in-law would therefore not be entitled to succeed to any part of the estate under California law[2] (Pet. App. A, p. 2). In reaching this determination, the court took judicial notice of a 1946

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[1] That section provides in pertinent part: "Administration of the estate of a person dying intestate must be granted to one or more of the following persons, who are entitled to letters in the following order, the relatives of the decedent being entitled to priority only when they are entitled to succeed to the estate or some portion thereof:"

* * * *

"(7) The relatives of a previously deceased spouse, when such relatives are entitled to succeed to some portion of the estate.

"(8) The public administrator."

[2] See California Probate Code, Section 228.

Treaty of Friendship, Commerce and Navigation between the United States of America and the Republic of China, 63 Stat. 1300, under Article VIII, Sections 2 and 4 of which (Pet. App. B, pp. 1-3) the contracting parties agreed to permit their nationals to have the benefit of real and personal property left to them within the other party's territory, on the same basis as nationals of that territory. The court concluded that the Treaty guaranteed rights of inheritance to the mother and mother-in-law and that such rights were sufficient to permit them to be declared the decedent's heirs-at-law despite Section 259 of the California Probate Code, which provides that the right of a nonresident alien to take real or personal property located in California by succession or testamentary disposition "upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take real [or personal] property upon the same terms and conditions as residents and citizens" of the country of which such alien is a resident (Pet. App. A, pp. 3-4, 10).

The California District Court of Appeals reversed. It recognized that, if the 1946 Treaty were applicable, its provisions would prevail over conflicting provisions of State law (Pet. App. A, p. 5). *Kolovrat* v. *Oregon*, 366 U.S. 187. The appellate court decided, however, that, although the Treaty was generally in force and effect as between the United States and the Republic of China, it was not presently operative to confer in-

heritance rights on the decedent's next-of-kin residing on the Chinese mainland, under the control of the Communist Chinese Government. The court relied upon the existence of a federal policy, manifested by various official acts and declarations of the Department of State, under which this country does not presently regard the 1946 Treaty as controlling the relationship between American citizens and the inhabitants of Communist China (Pet. App. A, p. 7).

On the basis of its ruling that the Treaty did not establish the existence of reciprocal rights of inheritance as between Americans and citizens of the Chinese mainland, the court held that petitioner had not sustained his burden (Section 259.1 of the Probate Code) of proving reciprocity[3] (Pet. App. A, p. 10). It followed that the mother and mother-in-law were not entitled to take the estate; that the respondent brother-in-law's right to do so was revived; and that he therefore had a prior right under Section 422 of the Probate Code to the letters of administration.[4]

The Department of State has advised us that it considers the 1946 Treaty as remaining in force between the United States and the Republic of China, but does not deem the Treaty currently effective with respect to areas on the mainland of China over which the National Government of the Republic of China does not now exercise authority. It invites attention

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[3] The California courts have held that the burden is on the public administrator in a case like the present one. *Estate of Bevilacqua*, 31 Cal. 2d 580, 584, 191 P. 2d 752, 756.

[4] The Supreme Court of California denied further review.

to the fact that, in light of developments on the mainland since 1949, many of the Treaty provisions cannot be given operative effect at this time. Among these are Article II, dealing with rights of residence, travel, and the carrying on of trade throughout the whole extent of the contracting Parties' territories; Articles III and IV, relating to the rights of corporations to be organized and to do business in the Parties' territories; and Article VI, guaranteeing to the Parties' nationals the protection and security of their persons and property as required by international law.[5]

The Department of State has further noted that the United States does not recognize the Peiping government and that that government apparently does not regard itself as obligated to carry out the provisions of the Treaty. Since nationals of the United States thus do not enjoy rights in mainland China by virtue of the Treaty--and specifically that of inheriting property from deceased residents of mainland China—the Department of State concludes that, in present circumstances, there is no legal requirement

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[5] In this connection, we are advised, for example, that travel controls are now maintained by the United States, and that Treasury controls over assets and financial transactions preclude the application of many provisions of the Treaty to the mainland. We are also advised that the institution of unilateral controls by the United States to trade with mainland areas under Communist domination is confirmed by diplomatic exchange between the Department of State and the Ambassador of the National Government of the Republic of China. These controls and regulations exclude from their effect the portions of China under the control of the National Government.

that the Treaty provisions governing inheritance be treated as operative with respect to the mainland of China.

Because of these considerations, it is the policy of the Department of State to consider the provisions of the Treaty as presently suspended with respect to areas of China not under the control of the National Government of the Republic of China. The determination of the court below is fully in accord with that policy. From the standpoint of the United States, there is accordingly no need for review by this Court.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

MARCH 1965

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IN THE

Supreme Court of the United States

October Term, 1964

No. 688

In the Matter of the Estate of LILLIAN ENG,
Deceased,

BALDO M. KRISTOVICH, Public Administrator,
Petitioner,

vs.

SHU TONG NG,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEALS OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION THREE.

PETITIONER'S REPLY TO THE RESPONDENT AND TO THE MEMORANDUM FOR THE UNITED STATES.

HAROLD W. KENNEDY,
County Counsel

and

S. ROBERT AMBROSE,
Deputy County Counsel

By HAROLD W. KENNEDY,
648 Hall of Administration
Los Angeles 12, California
Attorneys for Petitioner.

WESTERN PRINTING COMPANY, WHITTIER—OXBOW 8-1722

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IN THE

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BALDO M. KRISTOVICH, Public Administrator,
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PETITIONER'S REPLY TO THE MEMORANDUM FOR THE UNITED STATES

The Solicitor General states that they have been advised by the Department of State that it does not consider the 1946 Treaty between the United States and the Republic of China as currently effective with respect to [illegible] areas of the mainland of China. Petitioner was advised by the United States State Department in January of 1963 that the 1946 Treaty between the United States and the Republic of China was in full force and effect. Petitioner's advisement from the United States State Department came in

the form of a letter in answer to a request by your petitioner, and the letter of the United States State Department was relied upon and received into evidence by the trial court as Exhibit "A" (Certified Record, Reporter's Transcript, p. 38, line 6-25.)

The State Department's advisement to your petitioner in letter form was received shortly after the date of death of the decedent, Lillian Eng, and the controlling date as to the determination of reciprocal rights of inheritance between the United States and a foreign State is the date of death of the decedent. *Estate of Arbulich* (1953), 41 Cal. 2d 86, 257 P. 433; *Estate of Nepogodin,* 134 Cal. App. 2d 161; 285 P. 2d 672.

Your petitioner to carry his burden of proof as to establishing reciprocal rights of inheritance between the United States and the Republic of China, offered into evidence in the trial court the State Department's letter sent to your petitioner, and also had the trial court take judicial notice of the 1946 Treaty between the United States and the Republic of China. (Reporter's Transcript, p. 37 lines 5-6)

"Advice" by the United States State Department as to the 1946 treaty between the United States and the Republic of China is also noted in Volume 58 of the American Journal of International Law, pages 1003 and 1004, wherein it is stated that:

Following upon the decision in the matter of the *Estate of Anton Belemecich v. Commonwealth of Pennsylvania* by the U.S. Supreme Court on January 6, 1964, the Department received an inquiry as to the effect this case might have on the rights of foreign nationals residing in certain Iron Curtain countries to receive distribution from decedent's estates and trusts located in the United States. The Department's letter of reply stated, inter alia:

You will recall that this decision concerned actions by authorities of the Commonwealth of Pennsylvania with respect to rights of disposition of estates inherited in the United States, claimed by citizens of Yugoslavia, resident in that country. These rights were claimed under the Convention for Facilitating and Developing Commercial Relations between the United States and Serbia, signed at Belgrade October 2/14, 1881 (22 Stat. 963; TS 319; II Malloy 1613) which was held by the United States Supreme Court to have continued in force as between the United States and Yugoslavia in *Kolovrat et al. v. Oregon,* 366 US 187 (1961).

"The following treaties appear to be apposite:

"Treaty of Friendship, Commerce and Navigation between the United States and China, signed at Nanking November 4, 1946, and entered into force November 30, 1948 (63 Stat. 1299; TIAS 1871; 25 UNTS 69)."

In the memorandum of the United States the Department of State has invited attention to developments on the mainland of China since 1949, stating that such developments make many of the Treaty provisions inoperative at this time.

These same "developments" were also present in the decision handed down by this Court in *Clark v. Allen,* 331 U.S. 503, 67 S.Ct. 431, 91 L. Ed 1633, which upheld reciprocal rights of inheritance with Germany as to real property with the date of death of the decedent therein being 1942.

The Solicitor General also mentions in a footnote Treasury control of assets and financial transactions between the United States and the mainland of China. Your petitioner hereby stipulates to an order of this Court that the distributive shares of the heirs residing on the mainland of China be placed in a blocked account pursuant to the Treasury control regulations in 31 Code of Federal Regulations, 500:407-500:523. This Court has held in *Clark v. Allen,* supra, that the Trading with the Enemy Act, from which these Treasury regulations are derived, does not effect the inheritance rights granted resident aliens under a treaty.

PETITIONER'S REPLY TO THE RESPONDENT

Respondent has raised for the first time in the case at bar the question of the status of the heirs in China; namely, whether they are "Nationals" of the Republic of China. Respondent submits that "Since the Communists have been in control of the mainland for fifteen years—and since active hostilities have ceased, the mainland has been 'annexed' to the Communist government." Respondent cites as authority Oppenheim's International Law, Eighth Edition, edited by H. Lauterpacht, Volume 1, page 570. However, the particular section cited by the respondent at page 570 of Oppenheim's International Law, supra, is dealing with subjugation *by one State over another State.*

The case at bar concerning China is certainly not the subjugation of one State's will to another State's will, but is a revolution within a State itself, a civil war which is still presently existing between the nationalist government residing upon the Island of Formosa and the present Communist government on the mainland of China.

More related to the situation in the case at bar as to the status of residents on the mainland of China is Oppenheim's International Law, supra, Volumn 1 at page 153, under the general heading of "Changes

in Condition," wherein it is stated that: "a State remains one and the same International Person in spite of changes in its headship, in its dynasty, in its form, in its rank and title, and in its territory."

It is submitted by your petition that the change in the Republic of China was a revolutionary change within China with one of the resultants being the question as to which government is the proper head of the Republic of China—the citizens, however, still remain citizens and nationals of the Republic of China despite the revolutionary change in the government controlling the mainland of China. Oppenheim in his discussion of "changes in condition" with a State says at page 154 that:

> "But whatever may be the importance of such changes, they neither affect a State as an International Person, nor affect the personal identity of the State concerned. France, for instance, has retained her personal identity from the time the Law of Nations came into existence until the present day, although she acquired, lost, and regained parts of her territory, changed her dynasty, was a kingdom, a republic, an empire, again a kingdom, again a republic, again an empire, and now, finally as it seems, a republic. All her international rights and duties as an International Person remained the very same throughout the centuries in spite of these important changes in her condition and appearance."

The respondent cites as authority for the status of persons residing in a conquered country, Oppenheim's discussion at page 571. Again, this specific Section relied upon by the respondent deals with annexation of one State by another State. Relevant to the case at bar is Oppenheim's discussion of the modes of acquiring and losing nationality at pages 649-660, wherein he states at page 656 that,

> "The fourth and fifth modes of acquiring nationality are by subjugation after conquest and cession of territory, the inhabitants of the subjugated or the ceded territory acquiring ipso facto by the subjugation or cession the nationality of the State which acquires the territory."

It is submitted by your petitioner that in the case at bar involving the Communist control of the Republic of China there was no subjugation or cession by the Republic of China to another State. There was an internal revolution, a civil war, the driving out of one government and the establishment of another, the latter of which our Government does not recognize. The status of the residents on the mainland of China remains as nationals of the Republic of China. The heirs in China have not lost their "nationality" through any of the five modes recognized by International Law as set out by Oppenheim's International Law, supra, at pages 650-660.

Because of the important question involved and the conflict as to the applicable principles of International Law and the policy of the United States State Department as released to your petitioner and submitted into evidence shortly after the date of death of Lillian Eng, petitioner respectfully requests and prays that an order be made granting his petition.

HAROLD W. KENNEDY,
County Counsel

and

S. ROBERT AMBROSE,
Deputy County Counsel

By HAROLD W. KENNEDY,
Attorneys for Petitioner,